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NO. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

EXECUTIVE LEASING CORPORATION,
MANUEL GONZALEZ GIERBOLINI, and
LUZ IRAIDA GONZALEZ,
Petitioners,

v.

BANCO DE PONCE, BANCO POPULAR DE
PUERTO RICO, and BANPONCE CORP.,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in relying solely upon a state-law parol evidence rule to exclude evidence of an oral tying arrangement imposed by a lender in violation of the federal Bank Holding Company Act, 12 U.S.C. §1972.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luz Iraida Gonzalez.

The respondents are Banco de Ponce (now Banco Popular de Puerto Rico as Successor in Interest), Banco Popular de Puerto Rico, and Banponce Corp.

There are no parent or subsidiary companies to be listed pursuant to Rule 29.1.

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**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luz Iraida Gonzalez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered on February 27, 1995, in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Bownes, J.) is reported at 48 F.3d 66 (1st Cir. 1995), and is reprinted in the appendix hereto, at pages 16A to 25A. The Opinion and Order of the Magistrate Judge (Arenas, M.J.) is unreported, and is reprinted in the appendix hereto, at pages 1A to 14A.

JURISDICTION

Petitioners appeal from a judgment entered by the First Circuit Court of Appeals on February 27, 1995. Petitioners filed a petition for rehearing on March 13, 1995. The petition was denied on March 28, 1995. Appendix at 26A-28A. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

12 U.S.C. §1972(1). Certain tying arrangements prohibited; correspondent accounts.

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement —
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
> >
> > (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
> >
> > (C) that the customer provide some additional credit, property, or service to such bank, other than those re-

> lated to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.[1]

STATEMENT OF THE CASE

Introduction

This is a petition for review of a decision of the United States Court of Appeals for the First Circuit. The First Circuit's decision affirmed an order of the United States District Court for the District of Puerto Rico which granted summary judgment dismissing the claims of petitioners Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luz Iraida Gonzalez (collectively "Executive Leasing") against respondent Banco de Ponce ("Banco") for violating the tying provisions of 12 U.S.C. §1972 ("§1972") of the Bank Holding Company Act ("BHCA").[2] This statute, among other things,

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[1] The full text of 12 U.S.C. §1972 is set out in the appendix at pages 29A to 36A.

[2] The federal district court had jurisdiction over Executive Leasing's BHCA claims under 28 U.S.C. §1331, and had jurisdiction over the pendent state-law claims under 28 U.S.C. §1332.

prohibits a bank from requiring, as a condition on the extension of credit, that a borrower refrain from dealing with another bank.

Executive Leasing, which had a line of credit with Banco, alleged that Banco violated §1972(1)(E) by conditioning its extension of credit on the requirement that Executive Leasing refrain from obtaining financing for its business from any other lending institution. The District Court, however, granted summary judgment for Banco because the condition was not contained in the written loan agreement. Although Executive Leasing had alleged a violation of §1972, a federal statute, the District Court applied Puerto Rico's parol evidence rule to exclude Executive Leasing's proof that Banco had orally imposed a tying condition in violation of §1972. The First Circuit affirmed despite Executive Leasing's arguments that other federal circuits allow the use of parol evidence to establish violations of federal antitrust statutes that prohibit tying.

The First Circuit's decision on this important issue of federal law should be reviewed and reversed. In holding that evidence extrinsic to a written agreement may not be used to prove a violation of 12 U.S.C. §1972 because state law would not allow such evidence to prove state-law claims, it has rendered a decision that conflicts directly with a decision of the Fifth Circuit Court of Appeals under §1972. The First Circuit's decision also conflicts with decisions of other federal circuits which have allowed the introduction of evidence of oral conditions to establish violations of tying prohibitions like §1972 in other federal antitrust laws.

The First Circuit's decision should also be reviewed and reversed because it thwarts the intent of Congress by impermissibly limiting the scope of the anti-tying provisions in §1972, and by condoning tying conditions, no matter how harmful to free competition, so long as those conditions are not put in writing. By applying Puerto Rico's parol evidence rule to bar proof of a violation of a federal antitrust statute, the First Circuit's decision further contradicts the intent of Congress by allowing the parol evidence rule of the particular forum to determine the scope of the substantive prohibitions of the federal statute. This conclusion is unprecedented. Congress cannot have intended any such result when, at the behest of the President of the United States, it enacted sweeping, nationwide prohibitions of

anticompetitive lending practices.

Statement of Facts

Executive Leasing entered a loan agreement with Banco in May 1983 to obtain a revolving line of credit to finance its principal business, long-term vehicle leasing. Executive Leasing alleged that, as a condition to the extension of credit, Banco imposed an oral requirement that Executive Leasing refrain from financing its leasing business with any other bank. The exclusive dealing condition is not contained in the written loan documents, but was imposed orally. Appendix at 2A, 4A, 5A, 10A, 11A, 19A-22A.

The collateral for the loan included an assignment of lease contracts, rental payments, and accounts receivable, as well as promissory notes and personal guaranties made by the individual plaintiffs. The loan agreement was modified several times over the course of the financing relationship. On January 13, 1984, July 2, 1984, and August 13, 1985, the agreement was amended to increase the line of credit. The line of credit was decreased in December 1986. In December 1987 Banco called the loan, and in March 1988 the loan agreement was terminated. Appendix at 9A, 10A, 19A, 20A.

Executive Leasing alleged, and sought to prove, that Banco's oral imposition of the exclusive dealing condition violated 12 U.S.C. §1972(1)(E).[3] It alleged that this condition, which made Executive Leasing fatally dependent on Banco, was used by Banco (after it had acquired Velco, the largest leasing company in Puerto Rico as an affiliate in 1986) to drive Executive Leasing out of business and take over its vehicle leasing operations for the benefit of Velco. Executive Leasing alleged that, to accomplish these ends, Banco used not only the exclusive dealing condition but also other unfair tactics, such as structuring the line of credit to create an inherent liquidity shortage; making premature and improper charges against Execu-

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[3] Executive Leasing also claimed that Banco's conduct in connection with the loan violated other provisions of 12 U.S.C. §1972(1). Additionally, Executive Leasing asserted pendent claims against Banco under Puerto Rico law for breach of contract and fiduciary violations.

tive Leasing's accounts; and improperly refusing to extend new credit when there was availability on the line of credit and when Executive Leasing was not in default. Executive Leasing alleged that these actions — particularly the refusal to fund and the requirement that Executive Leasing not finance its business with any other lender — caused Executive Leasing to fall behind in its loan payments, resulting in the termination of the agreement, the destruction of its business, and diminished competition in the leasing market in Puerto Rico. All this was done by Banco to benefit its leasing affiliate who, as Executive Leasing later sought to prove through its expert economists, acquired not less than 90% monopoly power in a market characterized by significant barriers to entry. Appendix at 1A-4A, 19A.

Soon after the suit was filed Banco filed a motion to dismiss and a request for an order staying all discovery. In April 1989, the District Court stayed all discovery, barring Executive Leasing from discovery until April 1993, when the District Court denied Banco's motion to dismiss and set aside the stay. In January 1994, Banco again requested and obtained an order staying all discovery while it prepared and filed its motion for summary judgment.

When Banco later filed a motion for summary judgment, it tendered certain affidavits in support thereof. Banco's affiants were among the persons whom Executive Leasing had scheduled for deposition prior to this second stay of discovery. In response, Executive Leasing requested an opportunity under Fed. R. Civ. P. 56(f) to take discovery (including depositions of Banco's affiants) to oppose the motion for summary judgment. Executive Leasing also submitted its own affidavits and internal bank documents to prove that Banco had imposed the oral tying condition.[4] Executive Leasing also of-

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[4] The Statement Under Penalty of Perjury of Luz Iraida Gonzalez Turull, which the District Court rejected as extrinsic evidence to prove the illegal oral condition, attested to the following, among other things: "Banco de Ponce stated, through the officer of the Bank directly in charge of the Executive account, that Executive was prohibited by Banco de Ponce from borrowing from Banco Central, or from any other banking institution, to finance its long term vehicle leasing operations"; "The condition or requirement imposed upon Executive, of not financing its long term vehicle leasing operations with any other banking institution, was expressly and emphatically communicated to Executive by one or more representatives of Banco

fered the affidavits of its banking expert and its expert economists to prove that the exclusive dealing condition was unusual and anticompetitive. The District Court, however, denied Executive Leasing's request for discovery and entered summary judgment on the §1972 claim on the ground that Executive Leasing had not established a genuine issue of material fact. The District Court then dismissed the pendent claims for lack of jurisdiction.

The District Court recognized that the purpose of 12 U.S.C. §1972 is "to prohibit anti-competitive practices which require bank customers to accept or provide some other product or *refrain from dealing with other parties* in order to obtain the bank product or services they desire." Appendix at 7A (emphasis added). However, the District Court refused to consider Executive Leasing's affidavits and other documents attesting to Banco's oral imposition of the exclusive dealing condition. *Id.* at 9A-11A. Instead, the District Court simply looked to the terms of the Loan Agreement, which contained no such condition. The District Court held that, "[u]nder Puerto Rico Rules of Evidence, extrinsic evidence concerning the terms of an agreement is excluded when an agreement is clear and unambiguous," citing P.R. Laws Ann. tit. 32, app. IV, R. 69(B) (1983), and that "Once a court determines that the terms of a contract are sufficiently clear, the court cannot dwell on the alleged intent of the parties at the time they entered into the contract." *Id.* at 10A-11A. Deeming the evidence of the oral condition inadmissible to prove a violation of §1972, the District Court held that Executive Leasing had

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[4] (...continued)
de Ponce more than once"; "the exclusive dealing condition or requirement imposed by Banco de Ponce upon Executive, beginning in 1983 and thereafter, was and constitutes an unusual, improper and anti-competitive banking practice"; "[t]he said exclusive dealing condition or requirement had an anti-competitive effect and injured the plaintiffs in that, among other things, it: (i) deprived Executive of the benefit of maintaining viable continuous alternative sources of financing; (ii) increased Executive's dependence on the good faith of Banco de Ponce; and (iii) enabled Banco de Ponce '... to gain full control of all vehicles and leases which Executive owned ...' and to otherwise interfere with the way in which Executive ran its long term vehicle leasing business." Executive Leasing also submitted an internal memorandum from Banco dated November 18, 1983 (shortly after Banco first extended credit), that further supported the existence of the oral tying arrangement.

failed to create a genuine issue of material fact to avert summary judgment.

In its appeal to the First Circuit, Executive Leasing argued, among other things, that the District Court had erred in awarding summary judgment on the ground that Executive Leasing's proffered evidence of an oral exclusive dealing condition could not be admitted to establish a violation of 12 U.S.C. §1972(1). Executive Leasing argued in its principal brief that Puerto Rico's parol evidence rule did not bar the admission of extrinsic evidence to prove a statutory violation. Executive Leasing argued that "the proper methodology for dealing with extrinsic evidence had to take into account that the gravamen of the Amended Complaint is that *Banco violated specific prohibitions of the BHCA* from the outset of its relations with Executive...." (Emphasis added.)[5]

The First Circuit rejected this argument and affirmed the District Court, stating: "Because no such [exclusive dealing] restriction appears in the agreement itself, and the loan agreement, by its clear language, 'constitutes the entire agreement among the parties,' the District Court rejected the plaintiffs' extrinsic evidence of the exclusive dealing condition, including their own sworn affidavits." Appendix at 25A. The First Circuit also agreed with the holding that Puerto Rico law required the exclusion of evidence of the oral tying condition.[6]

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[5] Executive Leasing's reply brief also cited federal cases recognizing that tying violations under the federal antitrust laws may be established by proof of an extrinsic course of conduct supplementing a written contract. As Executive Leasing noted in its Petition for Rehearing, counsel for Executive Leasing also argued during oral argument that the plain language of 12 U.S.C. §1972, which prohibits a bank from extending credit on any of the enumerated conditions "in any manner," requires the admission of evidence of an oral tying condition to prove a violation.

[6] Although the First Circuit stated that "the plaintiff's extrinsic evidence of the actual practice of the parties would not have blocked summary judgment on their §1972(1)(E) claim," Appendix at 21A-22A n. 5, it did not suggest by this statement that the extrinsic evidence of the oral tying condition would not have established a violation of §1972(1)(E) if admitted. Instead, as the remainder of the footnote makes clear, the First Circuit was addressing the separate and distinct issue of whether the extrinsic evidence of the parties' *course of dealing* under the loan agreement indicated that the written loan agreement was not intended as a complete and integrated expression of their agreement.

In a petition for rehearing, Executive Leasing argued that the exclusion of an oral agreement to establish a violation of a federal statute directly contradicted a decision of the Fifth Circuit under §1972. It also argued that the exclusion was contrary to the rulings of the Third, Fourth, Seventh, and Eleventh Circuits applying similar provisions of federal antitrust law; was contrary to the rulings of the Supreme Court of Puerto Rico; and violated the principle of uniform interpretation of federal law. The First Circuit Court of Appeals denied Executive Leasing's petition for rehearing without opinion.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S HOLDING THAT EXTRINSIC EVIDENCE MAY NOT BE ADMITTED TO ESTABLISH A VIOLATION OF §1972(1) CONFLICTS DIRECTLY WITH A DECISION OF THE FIFTH CIRCUIT UNDER THAT STATUTE, AND ALSO CONFLICTS WITH DECISIONS OF FOUR OTHER CIRCUITS UNDER THE ANTI-TYING PROVISIONS OF OTHER FEDERAL ANTI-TRUST LAWS.

The decision below should be reviewed and reversed because (1) it resolves an important issue of federal law in a way that conflicts directly with decisions of other federal circuits, both under §1972 and similar provisions of other federal anti-trust laws, and (2) because it reaches a fundamentally incorrect result by excluding proof of exactly the conduct that the statute prohibits.[7] The exclusion of parol evidence to establish a violation of §1972 is inconsistent with the plain language of the statute, its legislative history, and the decisions of other federal courts applying §1972 and other similar provisions of the federal antitrust laws.

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[7] Although the First Circuit held that a number of Executive Leasing's arguments had been waived, Appendix at 17A-25A, it made no such holding with respect to its objection to the exclusion of extrinsic evidence of the oral tying condition, but instead considered and squarely decided the issue. Appendix at 20A-22A.

The Court's conclusion also threatens to work mischief by leading to the non-uniform interpretation and application of a federal law. When a federal statute prohibits conduct in express terms, a plaintiff must be allowed to introduce evidence of that conduct, regardless of whether the forum state's parol evidence rule would allow its introduction in a contract action. Applying the state's parol evidence rule to exclude evidence of conduct that is specifically prohibited by §1972 undercuts Congress' intent to impose nationwide federal restrictions on anti-competitive banking practices, such as the exclusive dealing condition that Executive Leasing seeks to prove Banco imposed on its loan.

A. The Court of Appeals' Decision Creates a Conflict Between the Circuits On the Issue of Whether Evidence of an Oral Condition Is Admissible to Prove a Violation of §1972(1).

The First Circuit's decision conflicts directly with *Dibidale of Louisiana v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990), *opinion amended and reinstated on rehearing*, 941 F.2d 308 (1991). In *Dibidale*, the Court vacated an award of summary judgment for the lender on a borrower's claim that an oral condition on the extension of credit violated 12 U.S.C. §1972. Plaintiff had sought a loan from the defendant lender to acquire and complete a partially built townhouse and boathouse development. Plaintiff alleged that the lender had violated §1972 by conditioning the loan on plaintiff's hiring of a particular contractor, Theriot, to finish the project. As in this case, the condition was not included in the loan documents.

To the contrary, the written loan agreement in *Dibidale* negated the argument that any such condition had been imposed. The borrower had certified in the written loan agreement that it had chosen Theriot's firm from among "numerous possible general contractors" and that it "was not coerced or forced by [the bank] in any manner to do so." 916 F.3d at 303, 307 n.4. The court deemed "without merit" the bank's assertion that plaintiff could not use parol evidence of the oral condition to establish a violation of §1972, stating:

> The terms of the loan agreement notwithstanding, the relevant issue is whether Dibidale has provided sufficient evidence that its hiring of Theriot was a condition or requirement of the loan so as to survive the banks' motion for summary judgment.

Id. at 307 n.4.

Accordingly, there is a direct conflict between, on the one hand, the decision of the First Circuit that refuses to allow a plaintiff to establish a violation of §1972 by proving an oral condition, and, on the other hand, the decision of the Fifth Circuit that allows such proof. The Court of Appeals' decision in this case should be reviewed to resolve this conflict over the interpretation and application of §1972.

Two other cases also address the issue raised by the First Circuit's opinion. In *Integon Life Insurance Corporation v. Browning*, 989 F.2d 1143 (11th Cir. 1993), the Eleventh Circuit, in affirming the grant of summary judgment for the defendant lender under the tying provisions of the Home Owners' Loan Act, 12 U.S.C. §1464, assumed without discussion (over the defendant's objections) that the trial court had properly considered parol evidence that a loan was improperly conditioned on the purchase of other property. The Eleventh Circuit thus appears to follow the Fifth Circuit and allows parol evidence to be considered.

In *Boulevard Bank Nat. Ass'n v. Adams Newspapers, Inc.*, 787 F. Supp. 122 (E.D. Mich. 1992), on the other hand, the District Court for the Eastern District of Michigan reached a conclusion that appears to take the side the First Circuit took here. In *Boulevard Bank*, the court rejected the plaintiff's claim that a lender bank had violated §1972 by conditioning the modification of a note on the bank's maintenance of a business relationship with the borrower's affiliate. The court stated: "This claim is clearly untenable. The original loan documents in no way tied the extension of credit to [the borrower] on the condition that [its affiliate's] accounts be maintained at [the lender]." 787 F. Supp. at 125.

In short, it is obvious that the conflict identified here can and will recur in other cases under §1972. It is, therefore, ripe for resolu-

tion by this Court.

B. The Court of Appeals' Decision to Exclude Evidence of an Oral Condition to Prove a Violation of §1972 Also Conflicts With Decisions of Other Circuits Under Federal Anti-Tying Statutes that Share the Same Legislative Purpose and Intent as §1972.

The Court of Appeals' decision also conflicts with the manner in which other federal circuits apply other federal anti-tying provisions that share the same legislative purpose as §1972. Section 1972 was enacted to "exten[d] to the field of commercial banking ... the general principles of the Sherman Antitrust Act prohibiting anti-competitive tying arrangements." *Integon*, 989 F.2d at 1149-1150, *citing Parsons Steel, Inc. v. First Alabama Bank*, 679 F.2d 242, 245 (11th Cir. 1982). Accordingly, courts have recognized that other federal antitrust laws provide a helpful analogy in construing §1972. *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 58-59 (5th Cir. 1978). *See also Integon*, 989 F.2d at 1150 (in construing anti-tying provisions of Home Owners' Loan Act, which in turn extended the same principles to federal thrifts, "it is appropriate to refer to anti-tying law as developed in both BHCA and anti-trust cases"), *citing Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 659 (9th Cir. 1988); 2B Sutherland Stat. Const. §51.03 (5th ed. 1992) (statutes that are modeled on each other and that share the same legislative purpose should be interpreted consistently to avoid thwarting the legislature's purpose).

Federal courts have unanimously allowed proof of oral agreements or conditions to establish violations of the anti-tying provisions of other federal antitrust statutes. In *Advance Business Systems & Supply Co. v. SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the Court of Appeals affirmed judgment for the plaintiff on tying claims under the Sherman and Clayton Acts. The plaintiff had entered a written agreement to rent copying machines from the defendant. The plaintiff alleged that the defendant had imposed an extracontractual tying condition requiring the lessee to use only the defendant's copying paper and other sup-

plies with the rented copiers. The court admitted evidence extrinsic to the contract, including proof of oral statements made by the defendant, to establish the tying violation. The court held that even though the illegal condition was not included in the written rental agreement,

> [a]n illegal tying arrangement may be shown to exist, however, even where it is not imposed by means of an express contractual provision. The presence of the illegal condition may be inferred from an *extrinsic course of conduct supplementing the written contract.*

415 F.2d at 64 (emphasis added).

The court in *Advance Business Systems* supported this conclusion by noting that an illegal tying condition "is no less invalid when it is written into a formal contract than when it is imposed by means of coercive or fraudulent practices." 415 F.2d at 66. "[I]mplied contracts, like express contracts, may be 'held over the heads of vendees [and] deny defendant's competitors access to the fenced-off market on the same terms as the defendant.'" *Id.* at 64, *quoting Northern Pacific Ry. v. United States*, 356 U.S. 1, 12 (1958).

Similarly in *Osborn v. Sinclair Refining Company*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961), the court reversed judgment for the defendant on a tying claim under the Sherman Act where the plaintiff alleged that the defendant had imposed an oral tying condition on a written lease. The court held that an oral agreement requiring plaintiff to purchase substantial quantities of a related product from the defendant evidenced a tying violation, and stated: "... an agreement, arrangement, or condition which unreasonably restrains trade in itself by price fixing, boycotts, or tie-ins, *need not be expressly embodied in written contracts.* Such arrangements may be deduced from a course of conduct...." *Id.* at 837 (emphasis added).[8]

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[8] *See also Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 977 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) (affirming judgment for plaintiff on tying

The Court of Appeals' decision should be reviewed because it impermissibly affords §1972 a far more limited scope than other federal antitrust statutes prohibiting tying arrangements, even though §1972 shares the same legislative purpose that motivated those prohibitions.

II. THE COURT OF APPEALS' DECISION IMPERMISSIBLY ALLOWS STATE LAW TO THWART CONGRESS' INTENT IN ENACTING UNIFORM FEDERAL PROHIBITIONS ON BANKING PRACTICES UNDER §1972.

A. The Court's Exclusion of Evidence of an Oral Tying Condition Directly Contradicts Congress' Intent, as Evidenced in the Plain Language of §1972 and Its Legislative History, to Prohibit All Anti-Competitive Tying Conditions on Lending Regardless of How They Are Imposed.

12 U.S.C. §1972(1)(E) provides that banks shall not, "in any manner," extend credit on the condition "that the customer shall not obtain some other credit, property, or service from a competitor of

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[8] (...continued)
claim under Sherman Act as against defendants' claims that franchise agreement on its face allowed the purchase of other units; "The presence of the illegal tying condition may be inferred from an extrinsic course of conduct supplementing the written contract"); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (presence of illegal condition may be inferred from course of conduct extrinsic to contract); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 450-452 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959) ("Probably nothing is more firmly settled in our antitrust jurisprudence than that an illegal contract may be inferred from all of the circumstances"; fact that written franchise agreement contained no provision requiring plaintiffs to deal exclusively in goods supplied by defendant would not be fatal to tying claim if plaintiff could demonstrate illegal condition or understanding from extrinsic course of conduct); *T.A.M., Inc. v. Gulf Oil Corp.*, 553 F. Supp. 499, 504 (E.D. Pa. 1982) (rejecting defendant's argument that absence of exclusive dealing agreement in written contract supported motion for summary judgment on tying claim under Clayton Act).

such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit." (Emphasis added.) The statute itself contains no parol evidence rule. Nor does the statute suggest that such a condition will be tolerated so long as it is not included in the written contract. To the contrary, the statute prohibits the imposition of such conditions "in any manner"; this language could not indicate any more clearly that illegal tying conditions are prohibited *regardless of how they are imposed.*

The statute's legislative history shows that Congress emphatically meant what it said. Congress enacted §1972 to respond to President Richard M. Nixon's concerns about the "disturbing trend in the past year toward erosion of the traditional separation of powers between the suppliers of money — the banks — and the users of money — commerce and industry," and his concerns that "[b]anking must not dominate commerce or be dominated by it." Supplementary Views of Edward W. Brooke, S.Rep. No. 91-1084, P.L. 91-607, 1970 U.S. Code of Cong. & Adm. News 5519, 5557.

As Senator Brooke, one of the sponsors of the amendment, explained in the Senate Report accompanying the enactment of the bill,

> The purpose of this section is to eliminate anticompetitive *practices* which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.
>
> * * *
>
> Thus, [this statute] proscribes tying, reciprocity, and exclusive dealing arrangements involving banks. Specifically, this section prevents banks from extending credit, leasing or selling property, furnishing any service, or fixing or varying the consideration for any of the foregoing, upon *any* condition, agreement or *understanding, either overt or tacit,* that the customer ... shall not obtain some other credit, property or

> service from a competitor of the bank or of some affiliate of the bank.

Id. at 5558 (emphasis added).

Again, Senator Brooke stated:

> It is important to note that 'per se' illegality arises where *either express or implied coercion* is involved. Thus, where the *totality of the circumstances* indicates that the customer has not voluntarily entered into the transaction but rather has been induced into doing so through *coercion, either express or implied*, the conduct under consideration is actionable under this provision.

112 Cong. Rec. 42432 (1970) (emphasis added.)

Congress' stated concern with anticompetitive "practices"; its intent to prohibit exclusive dealing arrangements that result from "conditions," "agreements," or "understanding[s], either overt or tacit"; its statement that tying may consist of "express or implied coercion" that may be inferred from "the totality of the circumstances"; and its express prohibition of the imposition of such conditions "in any manner" establishes that Congress unequivocally intended the prohibitions in §1972 to apply to oral conditions.

The First Circuit's refusal to entertain Executive Leasing's claim that Banco imposed an oral tying condition in violation of §1972 should be reviewed and reversed because it directly contradicts the plain language of the statute and the intent of Congress.

B. The First Circuit's Decision Impermissibly Allows State Law to Frustrate Congress' Intent to Prohibit Oral Tying Arrangements and Makes the Scope of Federal Prohibitions Depend on the Vagaries of State Law.

The First Circuit also erred because Puerto Rico's parol evidence rule cannot be applied to thwart the purpose of §1972. This Court has consistently held that a state rule cannot be applied if it conflicts with the purpose and effect of a federal statute.

For example, in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), this Court held that state rules of estoppel could not be applied in contravention of the purposes of a federal antitrust statute. Plaintiff had sued to recover royalties under a patent licensing agreement. The defendant claimed that a price-fixing stipulation in the patent license violated the Sherman Act. The District Court held that the defendant was estopped from asserting the invalidity of the license under the Sherman Act as a defense. The Court reversed, holding that the state estoppel doctrine so conflicted with the Sherman Act's prohibition of price-fixing that the federal court should reject its application. The Court stated:

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U.S. 64. ... [T]he doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. [Citations omitted.] *When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.* To the federal stat-

ute and policy, conflicting state law and policy must yield.

317 U.S. at 176 (emphasis added).

Similarly in *Dietrick v. Greaney*, 309 U.S. 190 (1940), this Court considered the question of whether the maker of a note could assert the invalidity of the transaction under the National Bank Act as a defense to payment. This Court rejected the argument that state law governed the question of whether the defense could be asserted, stating:

> But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted [citations omitted].

309 U.S. at 200-201.

In *Awotin v. Atlas Exchange National Bank of Chicago*, 295 U.S. 193 (1935), this Court summarily rejected the argument that the law of restitution of the forum state would allow a party who purchased securities from a bank to recover on the bank's agreement to repurchase the securities "without recourse," where such an agreement was prohibited by a federal banking statute. The Court stated:

> National banks are public institutions and *the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities*, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. *The prohibition would be nullified* and the evil sought to be avoided would persist, *if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them.*

295 U.S. at 214. *See also Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957) (rejecting application of common-law state rule against enforcement of executory agreements to arbitrate in favor of federally fashioned rule where state rule would "undercut" the Labor Management Relations Act and "defeat its policy"; Congress "adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule ... against enforcement of executory agreements to arbitrate").[9]

The First Circuit's decision in this case should be reviewed and reversed because the application of Puerto Rico's parol evidence rule would drastically limit the scope of §1972 in cases brought in Puerto Rico and thwart Congress' absolute and unequivocal intent to prohibit tying conditions, whether written or oral, overt or tacit. *See* discussion above at Section II.A.

Additionally, application of state parol evidence rules to determine whether an oral condition is actionable under §1972 would make the substantive prohibitions of a federal statute depend on the law of the forum in which the District Court sits. Where Congress intended its tying prohibitions to apply comprehensively as a matter of national policy, such non-uniform interpretation and application of the statute cannot be tolerated. *Jerome v. United States*, 318 U.S. 101, 104 (1943) (interpretation of federal statute of nationwide application is generally not dependent on state law); *Reconstruction Finance*

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[9] Federal courts have disregarded state parol evidence rules where their application would thwart or interfere with the purpose or effect of a federal statute. *See, e.g., Grainger v. State Security Life Ins. Co.*, 547 F.2d 303, 306 (5th Cir. 1977), *cert. denied*, 436 U.S. 932 (1978) (rejecting application of parol evidence rule to bar evidence of advertising and promotional efforts to determine whether an instrument was a "security" under the federal securities acts); *The Hammond Group, Inc. v. Republic National Life Ins. Co.*, CCH Fed. Sec. L. Rep. ¶95,456 at 99,306 (S.D.N.Y. 1976) (rejecting New York parol evidence rules in federal securities action; "Those rules, representing substantive law of the State of New York, do not prevent plaintiff from pleading oral discussions as constituting part of an actionable scheme to defraud under Rule 10b-5, simply because these conversations would be excluded in a contract or equity action."); *Roberts v. Poole*, 80 B.R. 81, 86 (N.D. Tex. 1987) (state parol evidence principles did not apply to determining whether debt was nondischargeable under federal bankruptcy laws).

Corp. v. Beaver County, Pa., 328 U.S. 204, 209 (1946) (Congress normally intends uniformity in the application of its laws in order that federal programs may operate unimpaired); *First National Bank v. Hasty*, 415 F. Supp. 170 (E.D. Mich. 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977) (it would be highly inconsistent for the federal Consumer Credit Protection Act, which was intended to install uniform national standards, to be interpreted in such a way that the remedy would vary from state to state). Puerto Rico's parol evidence should not be applied to bar proof of an oral condition as a violation of §1972.

CONCLUSION

For all the reasons stated above, Executive Leasing's petition for certiorari should be granted. The First Circuit's decision on the important federal issue discussed above creates a conflict among the circuits and, if left standing, would defeat Congress' clear intent and purpose under the BHCA.

Respectfully submitted,

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Dated: June 22, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXECUTIVE LEASING CORPORATION; MANUEL GONZALEZ GIERBOLINI and personally and on behalf of the CONJUGAL PARTNERSHIP constituted between them,

Plaintiffs

v.

BANCO POPULAR DE PUERTO RICO AND BANPONCE CORP.,

Defendant

CIVIL 89-0221 (HL)(JA)

OPINION AND ORDER

Plaintiffs Executive Leasing Corporation (hereinafter "Executive"), Manuel Gonzalez Gierbolini and Luz Iraida Gonzalez, both personally and on behalf of their conjugal partnership, filed this action against defendants Banco Popular de Puerto Rico and BanPonce Corp. (hereinafter "Popular").

This case arises out of a loan agreement between Popular and Executive and all the events that led to the subsequent termination of the lender-borrower relationship. Executive invokes federal question and supplemental jurisdiction. The only federal claim here is based on the anti-tying provisions of the Bank Holding Company Act (hereinafter "the Act"), 12 U.S.C. § 1972. In the amended complaint (Docket No. 65) Executive alleges, in sum, the following: On May 1983, Executive and Popular entered into a loan agreement whereby Popular granted Executive a line of credit collateralized by an assignment of accounts receivable covering the vehicle lease

contracts generated by Executive. As a condition to the loan, Popular required that part of the loan be used to pay off a then existing line of credit which Executive had with another bank, Banco Central Corp. Popular also prohibited Executive from doing business with Banco Central or any other banking institution.

On February 1986, Executive offered to sell Popular a group of lease contracts at a discount in order to release a substantial amount of its line of credit for further use on its business development. Subsequently, Popular terminated the negotiations of this sale alleging not having the internal operational facilities to manage the contracts. Then, on April 1986, Executive sold the contracts to another financial institution. Nevertheless, Executive still paid Popular the amounts owed in said lease contracts, thus releasing a substantial amount of its line of credit for further growth.

On May 3, 1986, the agreement was amended to provide the manner in which Popular would bill and collect from Executive, which was just a written provision of what already was the practice among the parties. Said practice consisted, in sum, in the following: 1) Popular would debit Executive's checking account; 2) fifteen days later, Popular would send Executive a detailed computation of the amount debited; 3) Executive would make a thorough review; and 4) Executive would make arrangements to cover any amount overdrawn, if necessary.

However, in July 1986, Popular notified Executive that henceforth it would not debit Executive's account but would send an invoice which Executive would be expected to pay promptly. This new system made it impossible for Executive to pay the amounts due. This change in billing was unilaterally implemented by Popular in contravention of the agreement with the improper purpose of creating the appearance that Executive was falling in arrears in its payments in order to justify getting Executive out of business upon acquiring Velco, one of Executive's competitors, on November 1986.

In April 1987, Executive sold to an unrelated party a second group of lease contracts and paid Popular the amount owed on said contracts, thereby liberating its line of credit for further growth. However, Popular, arbitrarily and without prior notice, refused to extend new credit to Executive with respect to new vehicle lease contracts

generated by Executive. This was a subterfuge employed by Popular to: 1) slow Executive's business, thereby improving the relative competitive position of Popular's affiliate, Velco; and 2) weaken Executive to the point that it would have to surrender its lease contracts for the benefit of Velco. Popular only extended credit for a few lease contracts in order to keep Executive "on the hook" while Popular allegedly reviewed Executive's line of credit so that Executive would not seek financing from another bank.

An excuse for not extending credit was that Executive's payments were overdue. This was not the practice between the parties, and, in any event, Popular had an excess collateral over debt at all times. This resulted in a reduction of $819,083 in the value of Executive's contracts.

As was foreseeable, Executive had to use such funds as it had available to pay the few vehicles it had purchased and, eventually, it fell behind in its regular payments to Popular. In August 1987, Popular informed Executive that it would not approve new credits until Executive's line of credit had been renewed by Popular's board of directors. Executive requested a long term loan in order to pay the outstanding amount. On November 12, 1987, Popular informed Executive that its loan had been approved and its credit renewed. Three weeks later, Popular notified Executive otherwise, and gave Executive thirty days to pay amounts owed or its property would be foreclosed. This period was extended for another fifteen days, but it was impossible for Executive to obtain financing from another institution in such a short period of time.

Faced with this situation, Mr. and Mrs. Gonzalez started negotiations with Velco to sell Executive. Velco originally had interest in acquiring Executive. However, after it was bought by Popular, it backed out and expressed having an interest in acquiring only the lease contracts, contrary to earlier negotiations.

Executive requested again extensions of time to pay, but Popular denied extension. Executive made several offers to Popular to work out the loan, which offers were rejected. Rather, Popular imposed on Executive the condition to deliver properties with an appraised value of $ 1,822,038 to satisfy a debt of 1,427,595 [sic]. This condition included Executive losing control of its clients. Popular coerced

Executive to accept the only solution whereby Popular would not foreclose: the transfer of all of Executive's lease contracts, including those over which Popular had no previous assignment, at an arbitrary discount rate, delivering to Popular absolute control of Executive's clients for the benefit of Velco. Several agreements were signed to deliver additional property to work out the loan, for a remaining outstanding balance of $131,013.51 which amount had to be paid within ninety days. Said amount was paid when due. Soon thereafter, Popular transferred to Velco the contracts and the corresponding clients were taken from Executive.

Executive alleges that Popular: 1) violated the anti-tying provision of the Act by: a) requiring Executive to pay and close the line of credit with Banco Central Corp. and in the future to abstain from doing business with any other bank; and b) requiring during the work out of the loan the sale of twenty lease contracts upon which it had no previous lien and the main assets of Executive for the benefit of Velco, which is an act not normally related to the ordinary course of banking business in connection with a loan; 2) breached its verbal commitment to lend; and 3) breached its fiduciary duty to Executive as borrower of the bank by forcing Executive to sell its lease contracts and to surrender additional property and benefits.

Popular filed a motion for summary judgment with a memorandum of law, a statement of uncontested facts and exhibits (Docket No. 91) alleging that the federal claim should be dismissed since: 1) Popular did not "extend credit" to Executive within the meaning of the Act; 2) the lease contracts and accounts receivable Executive delivered to Popular as partial payment in kind are not "additional property" for purposes of the Act; and 3) the payment of a loan is a "traditional banking practice" protected by the Act. It further alleges that the pendent claims should also be dismissed thereafter for lack of jurisdiction.

Executive filed an opposition to the motion for summary judgment with a memorandum of law, a statement of contested facts and exhibits (Docket No. 104) alleging that: 1) Popular imposed on Executive a prohibited tie as a "condition or requirement" to an "extension of credit" in order to obtain from Executive "additional credit, property or service" within the meaning of the Act; 2) the prohibited

tie imposed by Popular was "unusual" and not a "traditional banking practice" within the meaning of the Act; 3) each plaintiff is a "person" within the meaning of the Act; 4) the affirmative defenses raised by plaintiffs are unavailable to defendants under the Act; and 5) all of defendants' alleged uncontested facts have been fully controverted.

Popular filed a reply (Docket No. 110) alleging that: 1) Popular's extensions of time to allow Executive to pay its debt is not an "extension of credit" within the meaning of the Act; 2) the agreement to terminate the loan is not an "extension of credit" within the meaning of the Act; 3) a payment of a loan cannot be considered as "additional property" under the Act; 4) the lease contracts and accounts receivable delivered by Executive were part of the collateral of the loan agreement; and 5) the loan agreement did not contain an exclusive dealing condition.

Executive filed a sur-reply (Docket No. 113) arguing that Popular's arguments in its reply are erroneous. Popular requested leave of the court and filed a response to the sur-reply (Docket No. 116) alleging that Executive's new allegation that the loan agreement was a "simulation" should not be considered by the court since it was raised at the sur-reply for the first time and since a party to a simulated contract cannot impugn the agreement. Leave to file the response to the sur-reply is hereby granted. Executive filed a motion requesting that Popular's response to the sur-reply be stricken from the record (Docket No. 117). Said request is hereby denied.

In order to grant summary judgment, I must first find that there is no genuine issue as to any material fact, and, then, that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986); Lewis v. Gillette, Co., No. 93-1934, slip op. at 2 (1st Cir. Apr. 26, 1994); Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 90-91 (1st Cir. 1994).

These findings are, nevertheless, regulated by a shift in burden. The moving party "must put the ball in play, averring 'an absence of evidence to support the nonmoving party's case.'" Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3 (1st Cir. May 6, 1994). Once the moving party satisfies this requirement, the burden then shifts to the nonmoving party to establish the existence of at least one genuine issue of fact to affect the outcome of the litigation

and from which a reasonable trier of facts could find for the nonmoving party. Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3; Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d at 91. A genuine issue exists if there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of the truth at trial. LeBlanc v. Great. Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993). A fact is material if it might affect the outcome of the suit under the governing law, and a dispute is genuine if a reasonable jury could resolve it in favor of the nonmoving party. Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3.

To oppose the motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials. It must present definite and competent evidence in support which cannot be conjectural or problematic and must have substance "in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial." LeBlanc v. Great Am. Ins. Co., 6 F.3d at 841.

In this district, Local Rule 311.12 assists the court in dealing with these mechanics. It requires the moving party to file a separate statement of material facts that it alleges are not in issue, with specific references to the record. It requires the nonmoving party to file a separate statement of material facts that it alleges are in issue. Compliance with this rule is very critical since when entertaining the movant's arguments, the court will only consider those facts alleged in its statement, and failure of the non-movant to comply with the rule results in that the movant's statement is taken as admitted. See United States District Court for the District of Puerto Rico, Local Rules of the Court, Rule 311(12) (Butterworth de Puerto Rico (1994).

As the First Circuit stated, there is an "important dimensions" to summary judgment practice. Summary judgment "must be decided on the record as it stands, not on litigants' visions of what the facts might some day reveal." Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3. "Brash conjecture, coupled with earnest hope that something concrete will eventually materialize, is insufficient to block summary judgment." Id.

Popular requests summary judgment dismissing the federal claim which is based on 12 U.S.C. § 1972. Section 1972 of the Bank Hold-

ing Company Act states in relevant parts:

> (1) **A bank shall not** in any manner **extend credit . . . on the condition** or requirement—
>
> (A) that the customer shall **obtain** some **additional** credit, **property**, or service **from such bank** other than a loan, discount, deposit or trust service;
>
> (B) that the customer shall **obtain** some **additional** credit, **property** or service from a **bank holding company of such bank, or from any other subsidiary** of such bank holding company;
>
> (C) that the customer **provide** some **additional** credit, **property** or service to such **bank other than those related to and usually provided in connection with a loan**, discount deposit or trust service;
>
> (D) that the customer **provide** some **additional** credit, **property** or service to a **bank holding company of such bank, or to any other subsidiary** of such bank holding company; or
>
> (E) that the customer **shall not obtain** some **other credit**, property or service **from a competitor of such bank**, a bank holding company of such bank, or any subsidiary of such bank holding company, **other than a condition or requirement that such bank shall reasonably impose in a credit transaction** to assure the soundness of the credit.

Title 12 U.S.C. 1972(l) (emphasis mine).

The purpose of this Act is to prohibit anti-competitive practices which require bank customers to accept or provide some other product or refrain from dealing with other parties in order to obtain the bank product or services they desire. S. Rep. No. 1084, 91st Cong.,

2d Sess. 17 (1970) ; B.C. Recreational Indus. v. First Nat'l Bank of Boston, 639 F.2d 828, 832 (1st Cir. 1981).

In order to have a cause of action under this section, plaintiff must allege and establish two elements: First, the claim must be based on an extension of credit. Second, the bank must have agreed to extend credit on the condition that the customer obtain or provide some additional property from or to the bank or that the customer not obtain some other credit or property from a competitor of such bank. See id.

Even if a particular arrangement is a prohibited tie-in, it would still be exempt form [sic] the Act if it falls within the range of "appropriate traditional banking practices." B.C. Recreational Indus. v. First Nat'l Bank of Boston, 639 F.2d at 832. There are three exemptions to these prohibitions under which there is no liability, and they are: 1) that the additional property the customer must obtain from the bank is related to the loan; 2) that the additional property the customer must provide to the bank is related to and usually provided in connection with a loan; or 3) that the condition of not obtaining credit from another bank is a condition that such bank shall reasonably impose to assure the soundness of the credit. See 12 U.S.C. § 1972(1); see Flags I, Inc. v. Boston Five Cents Sav. Bank, 831 F. Supp. 928, 934 (D.N.H. 1993).[1]

There are two agreements involved here: 1) the loan agreement; and 2) the agreement to terminate the loan. Executive alleges that both were extensions of credit conditioned upon a prohibited tying agreement. In order to determine whether Popular has any liability, I will consider under the mechanics of Rule 56 whether each agree-

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[1] In their briefs, the parties argue over Executive's allegation that due to a previous report and recommendation on a Rule 15 motion, this court is bound by the "law of the case" to consider only three elements I mentioned there. I stated that "[a]s a general proposition" in order to recover under the Act plaintiff must plead and prove: 1) an unusual banking practice; 2) a tying arrangement; and 3) a benefit to the bank. (Docket No. 52, Report and Recommendation of August 5, 1991, page 3, adopted by the court in Docket No. 64.) It is not necessary to consider the merits of Executive's argument on the "law of the case," because in order to establish the second element, an anti-competitive tying arrangement, plaintiff must obviously prove the elements expressly established in section 1972 for prohibited tying agreements.

ment was: 1) an extension of credit; 2) conditioned upon a prohibited tying agreement; 3) not exempted under the traditional banking practices.

THE LOAN AGREEMENT

On May 3, 1983, Popular and Executive signed a loan agreement. The purpose of the same was to provide Executive with a revolving line of credit of up to the principal aggregate amount of $600,000. Executive was to use the credit to pay a debt it had with Banco Central and to finance the purchase of motor vehicles and its accounts receivable consisting of motor vehicle leasing contracts subject to annual revision upon receipt of Executive's financial statements. (See Docket No. 91, Statement of Uncontested Facts page 2; Docket No. 91, Exhibit 3, page 1.) As security for the repayment of the loan, Executive delivered to Popular a collateral which included the assignment of lease contracts, rental payments and accounts receivable as well as the personal guaranties of the individual plaintiffs and some promissory notes. (See Docket No. 91, Statement of Uncontested Facts page 2-3; Docket No. 91, Exhibit 3, page 1.)

This agreement was modified several times to increase or decrease the line of credit. On January 13, 1984, the agreement was amended to increase the line of credit, but the collateral remained the same. On July 2, 1984, and August 13, 1985, Popular renewed and increased the line of credit, but the collateral again remained the same. (See Docket No. 91, Statement of Uncontested Facts page 3-4; Docket No. 91, Exhibits 4 and 6.) On December 23, 1986, upon Executive's request, Popular reduced the line of credit, but the collateral, once again, remained the same. (See Docket No. 91, Statement of Uncontested Facts page 5-6; Docket No. 91, Exhibit 10, page 2.) Finally, Executive defaulted on the loan and this line of credit was terminated.

Extension of credit:

Executive sustains that this loan agreement was an extension of credit conditioned upon a prohibited tying arrangement. It alleges that Popular agreed to give the loan on the condition that Executive not obtain some other credit from any other banking institution in

violation of the Act's prohibition against exclusive dealing conditions (subsection (E).)

There is no issue in this case that the loan agreement was an extension of credit. Nevertheless, in order for Popular to be liable, said extension of credit must be conditioned upon a tying arrangement not exempted under applicable law.

Prohibited tying condition:

Executive alleges that in the loan agreement Popular extended credit to Executive on the condition that Executive pay and close the line of credit which it had with Banco Central Corp., and, in the future, abstain from doing business with any other bank. However, as Popular argues, the record belies Executive's allegations. There is no such provision in the loan agreement. It states only that part of the money from the loan would "be used for the payment of the balance due under certain obligations with Banco Central . . . ." (See Docket No.91, Statement of Uncontested Facts page 2; Docket No. 91, Exhibit 3, page 1.) It also states that the agreement "constitutes the entire agreement among the parties [and] . . . [n]o covenant or condition not expressed in this agreement shall affect or be effective to interpret, change or restrict this agreement. No change . . . shall be binding unless in writing." (Docket No. 91, Exhibit 3, page 17.) Nowhere does it state that Executive is required to abstain from doing business with that institution or any other.

Under Puerto Rico Rules of Evidence, extrinsic evidence concerning the terms of an agreement is excluded when an agreement is clear and unambiguous. P.R. Laws Ann. tit. 32, app. IV, R. 69(B) (1983). This principle has a statutory counterpart. Article 1233 of the Puerto Rico Civil Code provides that if the terms of a contract are clear, the literal sense of its stipulations shall be observed. P.R. Laws Ann. tit. 31, § 3471 (1991). For purposes of these provisions, a term is considered "clear" when it is sufficiently lucid to be understood to have one particular meaning, without room for doubt. Vulcan Tools of Puerto Rico v. Makita U.S.A. Inc., No. 93-2089, slip op. at 3 (1st Cir. May 4, 1994); Hopgood v. Merrill Lynch, Pierce, Fenner & Smith, 839 F. Supp. 98, 107 (D.P.R. 1993); see Marina Indus., Inc. v. Brown Boveri, 14 Official Translations of the Opinions of the Supreme Court of Puerto Rico 91, 94 (1983). Once a court determines that the terms

of a contract are sufficiently clear, the court cannot dwell on the alleged intent of the parties at the time they entered into the contract. Vulcan Tools of Puerto Rico v. Makita U.S.A. Inc., No. 93-2089, slip op. at 3-4; Hopgood v. Merrill Lynch, Pierce, Fenner & Smith, 839 F. Supp. at 107.

In the loan agreement, the only reference to another bank is in the preamble, where it states that part of the money will be used to pay a debt with Banco Central. The language there is very clear. I do not find room for doubt in the meaning of "pay a debt," nor do I find room for doubt that no term shall be binding unless expressly provided in the contract. For these reasons, I cannot dwell on Executive's allegation of a tying condition outside of the contract. Executive's allegations of such a condition is not sufficient to create a genuine issue of material facts to rebut summary judgment.

THE TERMINATION AGREEMENT

On March 2, 1988, Popular and Executive signed an agreement to terminate the loan and establish the manner of repayment of the debt in the sum of $1,424,628.99. (See Docket No. 91, Statement of Uncontested Facts page 11; Docket No. 91, Exhibit 22, page 1.)

Extension of credit:

Executive alleges that Popular "extended credit" when it agreed to accept payment of the remaining balance within ninety days. It argues that the termination agreement really was a stay, forbearance and even a new separate extension of credit. It alleges that in exchange, Popular required Executive to deliver the lease contracts an [sic] accounts receivable as partial payment in kind in violation of subsection (C).

Popular argues that this agreement did not constitute an extension of credit within the meaning of the Act. It argues that the courts that have addressed this issue have found extensions of credit only in situations where the bank restructured or refinanced the loan, as opposed to this case where the loan was terminated and there was foreclosure and repayment. See, e.g., Freidco of Wilmington v. Farmers Bank, 499 F. Supp. 995, 1001 (D. Del. 1980) (finding that a restructuring agreement is an "extension of credit") ; Nordic Bank PLC v.

Trend Group, Ltd., 619 F. Supp. 542, 554 (S.D.N.Y. 1985) (finding that forbearance is an "extension of credit"); Parsons Steel v. First Alabama Bank of Montgomery, 679 F.2d 242, 242-43 (11th Cir. 1982) (implicitly holding that refinancing is an "extension of credit"); Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, 837 F.2d 712, 718 (5th Cir. 1988) (finding that refinancing is an "extension of credit").

The termination agreement in its preamble states:

> WHEREAS, the Bank and the Company entered into a Loan Agreement . . . pursuant to which the Company Executed and delivered to the Bank several promissory notes (the "Notes") which are on this date overdue and payable in full;
>
> . . .
>
> WHEREAS, [Executive] and [Popular] agreed to **terminate the Loan Agreement** and have to said effect agreed upon the manner of repayment of the Indebtment; . . . ."

Termination Agreement, Docket No. 91, Exhibit 22, page 1.

The language of this agreement is also clear. Its purpose is to terminate the agreement and establish the manner of repayment of the loan. It does not leave room for doubt as to its meaning. Moreover, I cannot find any clause in the entire agreement providing for an extension of credit.

Executive argues that to the extent that the agreement granted it additional days to pay, it constitutes an "extension of credit" within the Act. The documentary evidence in the record shows that on various occasions, including in the termination agreement, Popular granted Executive an extension of time to pay the amounts owed. (See, e.g., Docket No. 91, Exhibit 16-Letter of Rafael Blanco; Docket No. 91, Exhibit 22, page 2.) Nevertheless, Executive has failed to provide this court with any authorities to support the position that an extension of time to pay by itself constitutes an "extension of credit."

Furthermore, I find Popular's argument more persuasive. Neither the termination agreement nor all other extensions of time in-

volve any new funds, new collateral, new credit terms, or interest. To construe the concept of "extension of credit" within the context of section 1972 to include any extension of time to pay a debt is too encompassing and would only restrain banks from granting extensions of time to their customers. Therefore, neither the termination agreement nor any other extensions of time granted should be construed as an "extension of credit."

Prohibited tying condition:

Even assuming that Popular extended credit to Executive when it agreed to accept payment within ninety days, said extension of credit was not conditioned upon any "additional property" for purposes of the Act. The lease contracts and accounts receivable as partial payment in kind of an outstanding debt are not "additional property" within the meaning of the Act, irrespective of the benefit the bank may derive from them in the future. It is obvious that any extension of credit will be conditioned upon some commitment to repay. Nowhere does the termination agreement require any property for other purposes than to repay and guarantee the repayment of the then terminated loan. To that extent, even if Executive agreed to deliver property to which Popular had no previous lien, it was property of a kind "usually provided in connection with a loan." Therefore, since the property received was in payment of the loan it cannot be considered "additional property" under the Act. See Freidco of Wilmington v. Farmers Bank, 499 F. Supp. at 1002.

Executive also alleges that Popular coerced it to enter into the termination agreement by leaving no other alternative in order to avoid foreclosure. Somehow, Executive links "coercion" with a tying condition. Executive's pleadings raise many allegations against Popular of "unusual" practices, none of which are related to the threshold showing required in a section 1972 claim. For example, this allegation of coercion permeates most of its pleadings and briefs, but, as all other non-related allegations, it is irrelevant to the section 1972 claim. Therefore, it is not necessary to consider it on the merits. Cf. Dibidale of Louisiana, Inc. v. American Bank & Trust Co., 916 F.2d 300, 304-47 (5th Cir. 1990), (amended but reinstated 941 F.2d 308 (5th Cir. 1991)) (stating that a section 1972 tying condition does not require the element of coercion).

Additionally, Executive supports its allegations of duress with affidavits which state what the affiants were informed by Popular's representatives. See Docket No. 104, Exhibit F and G. However, hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment. Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). Besides, more than a mere allegation of oral coercion is required to invalidate a written settlement agreement to terminate a loan. Cf. Integon Life Ins. Corp. v. Browning, 989 F.2d 1143, 1152 n.21 (11th Cir. 1993) (stating that something more than a naked and unsubstantiated allegation of oral coercion should be required to create an issue of material fact relative to whether the complaining party was coerced into purchasing the tied product or service since allowing that would undermine the force and legal effect of language in transactional documentation created by "competent attorneys in a give-and take [sic] business situation" and would be inviting "commercial chaos").

Executive has failed to raise genuine issues of material facts which could be sufficient to establish at trial that the loan agreement or the termination agreement were "extensions of credit" conditioned upon a prohibited tying agreement not exempted by law. Therefore, summary judgment is granted on the section 1972 claim. Since the federal claim was the only basis for federal jurisdiction here, the pendent claims are dismissed without prejudice for want of jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Rivera v. Murphy, 979 F.2d 259, 264 (1st Cir. 1992) ; Figueroa Ruiz v. Alegria, 896 F.2d 645, 650 (1st Cir. 1990). In view of the foregoing, this case is hereby dismissed. Judgment will be entered accordingly.

At San Juan, Puerto Rico, this 20th day of June, 1994.

/s/ Justo Arenas
JUSTO ARENAS
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXECUTIVE LEASING CORPORATION MANUAL GONZÁLEZ-GIERBOLINI AND PERSONALLY AND ON BEHALF OF THE CONJUGAL PARTNERSHIP CONSTITUTED BETWEEN THEM, Plaintiffs v. BANCO POPULAR DE PUERTO RICO AND BANPONCE CORP., Defendants	*	CASE NO. 89-0221 (HL) (JA)

AMENDED JUDGMENT

The Court, through the Honorable Magistrate Judge Justo Arenas, has entered an opinion and order on June 20, 1994 for the entry of final judgment. WHEREFORE, it is

ORDERED AND ADJUDGED that the pendent claims are hereby dismissed without prejudice for want of jurisdiction. IT IS,

FURTHER ORDERED AND ADJUDGED that this case be and is hereby dismissed.

IT IS SO ORDERED.

In Hato Rey, Puerto Rico, this 27th day of June, 1994.

LYDIA PELEGRIN
Clerk of the Court

/s/ Tere Mollfulleda
Deputy Clerk

s/cs: Harold D. Vicente
Héctor Cuebas-Tañón
Néstor Durán
Jaime Toro-Monserrate
OB

United States Court of Appeals
For the First Circuit

No. 94-1877

EXECUTIVE LEASING CORPORATION, ET AL.,

Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(Hon. Hector M. Laffitte, U.S. District Judge)

Before

Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

Harold D. Vicente, with whom Vicente & Cuebas were on brief for appellant.

Nestor Duran-Gonzalez, with whom Jaime E. Toro-Monserrate and McConnell Valdez were on brief for appellee.

February 27, 1995

BOWNES, Senior Circuit Judge. The plaintiffs, Executive Leasing Corporation, Manuel Gonzalez Gierbolini and Luz Iraida Gonzalez (both personally and on behalf of their conjugal partnership), allege that defendants Banco de Ponce (now Banco Popular de Puerto Rico, as successor-in-interest) and BanPonce Corporation (collectively, "Banco") violated various provisions of the Bank Holding Company Act (BHCA), 12 U.S.C. §§ 1971 et seq., and Puerto Rico law in their loan transactions with the plaintiffs. The district court entered summary judgment for the defendants on the BHCA claim and dismissed the pendent claims without prejudice. Executive Leasing Corp. v. Banco Popular de Puerto Rico, 1994 WL 448985 (D.P.R. June 20, 1994). The plaintiffs appeal, and we affirm.

As a threshold matter, we think that the plaintiffs seriously misconceive their burden on appeal. The plaintiffs make little effort to develop either their factual allegations or their claims of error; instead, they offer conclusory statements, undigested record citations, repeated assurances that the district court was "thoroughly briefed" on various matters, and reminders that in reviewing a grant of summary judgment, we are "free to consider the entire record." The plaintiff's brief is less a brief than an attempt to incorporate their voluminous district court pleadings by reference.[1] We have held that attorneys cannot circumvent the page limit of Fed. R. App. P. 28(g) by incorporating by reference a brief filed in another forum. Katz v. King, 627 F.2d 568, 575 (1st Cir. 1980). "If counsel desires

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[1] See, e.g., Plaintiffs' Brief at 29 ("The analysis of the extrinsic evidence controversy . . . which was proffered by Executive to the District Court deals adequately with the matter and it is incorporated by reference."); id. at 35 ("Executive explained the civil law methodology [for dealing with extrinsic evidence in cases alleging illegality or fraud] to the District Court and Executive's explanation is incorporated by reference."); id. at 41 ("Executive provided the District Court with Executive's own understanding of . . . the elements of a BHCA claim. . . . Executive respectfully directs the attention of this Court to the relevant materials, and incorporates them by reference.") (there follows a citation to forty pages of the plaintiffs' brief in opposition to summary judgment). The brief is littered with many more examples of implicit incorporation in lieu of factual and legal argument. See, e.g., id. at 31, 39, 40-41 (two examples), 43-46 (four examples).

our consideration of a particular argument, the argument must appear within the four corners of the brief filed in this court." Id. See also Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1430 (7th Cir. 1986) (issues cannot be preserved by reference to documents filed in the district court; issues must be argued to be preserved); Prudential Ins. Co. of Am. v. Sipula, 776 F.2d 157, 161 n.1 (7th Cir. 1985) (practice of incorporation results in a composite brief of more than fifty pages; "any risk of oversight [by the court] or of the failure to present properly the arguments on appeal rests with [appellant]").

These appellate rules are wholly consistent with our de novo review of summary judgments.[2] While we view the summary judgment record in the light most favorable to the nonmoving party, and indulge all reasonable inferences in that party's favor, see, e.g., Vasapolli v. Rostoff, 39 F.3d 27, 32 (1st Cir. 1994), appellants are not excused from arguing the issues being appealed. We will not rely upon arguments and allegations that are developed only in the district court pleadings.

In light of these principles, most of the plaintiffs' appellate arguments must be deemed waived for lack of developed argumentation. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990). We address only those arguments that have arguably been preserved.[3]

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[2] Summary judgment is appropriate when the record reflects "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

[3] Alerted by Banco's brief to their possible waiver, the plaintiffs use their reply brief to "set forth a succinct and veridic version of the facts . . . with limited references to the documents which are part of the record." Arguments not made in the appellant's opening brief, however, are deemed waived. See, e.g., Sandstrom v. Chemlawn Corp., 904 F.2d 83, 86 (1st Cir. 1990). Moreover, the plaintiffs have not cured the defects of their opening brief. Although Banco's alleged loan agreement violations, use of "disinformation," and other anti-competitive practices may be highly relevant to the plaintiffs' claims under Puerto Rico law, the reply brief also fails to raise a genuine issue of material fact with respect to the BHCA claims.

I. FACTS

In May, 1983, Executive Leasing Corporation ("Executive") entered a loan agreement with Banco, whereby Executive obtained a line of credit for its principal business, long-term vehicle leasing. As collateral, Executive assigned to Banco the accounts receivable generated by its lease contracts. Part of the loan was to be used to discharge Executive's debt to another bank.

As a condition for the loan, Banco allegedly prohibited Executive from financing its leasing business with any other bank. This claimed exclusive dealing condition does not appear in the loan agreement. In fact, the agreement has an integration clause that provides:

> [This agreement] constitutes the entire agreement among the parties . . . . No covenant or condition not expressed in this agreement shall affect or be effective to interpret, change or restrict this agreement. No change, termination or attempted waiver shall be binding unless in writing.

The exclusive dealing condition was allegedly part of Banco's scheme to drive Executive out of business and to take over its vehicle leasing operation for the benefit of Banco's corporate affiliate, Velco, which happened to be Executive's main competitor. To that end, Banco allegedly structured Executive's line of credit to create an inherent liquidity shortage; made premature and improper charges against Executive's account; and improperly refused to extend new credit to Executive when it was not in default.

Executive eventually fell behind in its loan payments. In December, 1987, Banco called the loan. Plaintiffs claim that it did so without granting Executive a meaningful opportunity to obtain alternative financing, or placing Executive on default status as required by the loan agreement. In March, 1988, the parties entered an agreement to terminate the loan agreement. Executive agreed to transfer its main assets and all of its lease contracts — even those in which Banco had no previous interest — to Banco, allegedly for the benefit of Velco.

The plaintiffs claim that under the Bank Holding Company Act,

both the initial loan agreement and the 1988 termination agreement were extensions of credit conditioned upon a prohibited tying arrangement.

II. DISCUSSION

A. The loan agreement

The plaintiffs argue that Banco violated the BHCA by extending credit to Executive on condition that it "not obtain some other credit, property, or service from a competitor of such bank . . . ." 12 U.S.C. § 1972(1)(E).[4] Because no such restriction appears in the agreement itself, and the loan agreement, by its clear language, "constitutes the entire agreement among the parties," the district court rejected the plaintiffs' extrinsic evidence of the exclusive dealing condition, including their own sworn affidavits. See Executive Leasing, 1994 WL 448985, at *7 (citing P.R. Laws Ann. tit. 32, App. IV, R. 69(B) (1983) (Parol Evidence Rule) (evidence extrinsic to an oral or written agreement is inadmissible where "all the terms and conditions constituting the true and final intention of the parties have been included"); P.R. Laws Ann. tit. 31, § 3471 (1991) (Article 1233 of the Civil Code) ("If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed. . . .") ; Vulcan Tools of Puerto Rico v. Makita USA, Inc., 23 F.3d 564, 567 (1st Cir. 1994) (applying Puerto Rico law; "[w]hen an agreement leaves no doubt as to the intent of the parties, a court should not look beyond the literal terms of the contract.")).

Under Puerto Rico law, an agreement is "clear" when it can "'be understood in one sense alone, without leaving any room for doubt, controversies or difference of interpretation . . . .'" Catullo v. Metzner,

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[4] Under 12 U.S.C. § 1972(1)(E), a bank may not, among other things, extend credit on the condition or requirement that "the customer shall not obtain some other credit, property, or service from a competitor of such bank . . . other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit."

834 F.2d 1075, 1079 (1st Cir. 1987) (quoting Heirs of Ramirez v. Superior Court, 81 P.R.R. 347, 351 (1959)). The plaintiffs concede that the loan agreement is clear. They argue, however, that the written agreement was not in fact the entire agreement, and that we must consider extrinsic evidence of the parties' intent with respect to integration. This argument is supported by a selective reading of Article 1233 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31, § 3471:

> If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed.
>
> If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail.

Relying exclusively on the second sentence quoted, the plaintiffs argue that the words of the integration clause are in fact "contrary to the evident intention of the contracting parties." Yet to consider the extrinsic evidence at all, the court must first find the relevant terms of the agreement unclear. That requirement not being met, the district court correctly went no further. See Vulcan, 23 F.3d at 564 (because the contractual term "non-exclusive" is clear and unambiguous, there is "no need to dwell on" extrinsic evidence of the supplier's alleged promise to limit the number of its distributors); Ballester Hermanos, Inc. v. Campbell Soup Co., 797 F. Supp. 103, 108 n.4 (D.P.R. 1992) (under Puerto Rico's Civil Code and parol evidence rule, parties may resort to extrinsic evidence of circumstances surrounding the document "to assist in the interpretation of an apparent conflict in the written text") (emphasis added); Nike Int'l Ltd. v. Athletic Sales, Inc., 689 F. Supp. 1235 (D.P.R. 1988) (under Article 1233 of the Civil Code, intent of the parties "is to be gleaned first from the literal terms of the contract and then, if necessary, from the circumstances surrounding its execution") (emphasis added).[5]

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[5] The plaintiffs cite several civil law treatises for the proposition that the correct methodology for determining the intention of contracting parties is "to consider, not only the written contract itself, but all other evidence which would otherwise be

The plaintiffs attempt to distinguish our decision in Vulcan Tools, 23 F.3d at 567-68, where we excluded extrinsic evidence that was offered to vary a clear and unambiguous term of the contract, on the ground that fraud and illegality were not alleged. This argument is made only by the attempted incorporation of a surreply filed with the district court; accordingly, it has been waived. In their original complaint, the plaintiffs made no allegation regarding exclusive dealing, let alone fraud. Fraud was not alleged in the amended complaint, or even in the tendered, but rejected, second amended complaint.

Even were we to reach the argument of illegality, we would reject it on the merits. The plaintiffs' extrinsic evidence was offered not to illuminate (for example) the circumstances under which the agreement was made, see R. 69(B), but to contravene an express term of the agreement. The plaintiffs have cited no authority to suggest that the illegality exception to Puerto Rico's parol evidence rule sweeps this far. The district court correctly excluded any evidence of the exclusive dealing condition.

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5 (...continued)
admissible." The admissibility of the "other evidence" under Puerto Rico law, however, depends in the first instance on the clarity of the written contract. See Vulcan Tools, 23 F.3d at 567-68; Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 894 (1st Cir. 1992) (where both parties offered extrinsic evidence contradicting the clear terms of a promissory note, court is nonetheless "bound to look no further than the note itself").

We note, too, that the plaintiffs' extrinsic evidence of the actual practice of the parties would not have blocked summary judgment on their § 1972(1)(E) claim. For example, Banco tolerated Executive's repeated overdrafts and delays in payment, even though the loan agreement required Executive to pay on time. The practice of permitting late payments and overdrafts strikes us as a reasonable accommodation to Executive; it raises no genuine question regarding the integration of the agreement. As for Banco's other alleged deviations from the loan agreement, the integration clause provides that "no change . . . shall be binding unless in writing" (emphasis added). This is not a representation that there would never be any variance, however small, from the agreement. With respect to terms that the parties intended to be binding and enforceable, nothing plaintiffs have articulated on appeal leads us to doubt that the loan agreement should "be deemed as complete" under Puerto Rico's parol evidence rule. P.R. Laws Ann. tit. 32, App. IV, R. 69(B). In fact, on several occasions when Banco renewed Executive's line of credit or adjusted the terms of the loan, it did so in writing as required by the loan agreement.

B. The termination agreement

Under the BHCA, banks may not require, as a condition for extending credit, that "the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company." 12 U.S.C. § 1972 (1)(D). The plaintiffs allege that Banco violated § 1972(1)(D) by forcing Executive to surrender its vehicle leasing business to Banco for the benefit of its leasing affiliate, Velco.[6]

The plaintiffs make only a cursory argument that Executive was in fact required to provide "additional . . . property" (as opposed to the collateral for the loan) within the meaning of the BHCA. For a "detailed exposition of the facts" and the plaintiffs' legal theories, we are directed to their pleadings below. We rule that the plaintiffs' argument under § 1972(l)(D) has been waived.[7]

We turn now to two claims of procedural error, which we assess in light of their effect (if any) upon the summary judgment proceedings.

C. The second amended complaint

The plaintiffs argue that the district court abused its discretion by denying them leave to file a second amended complaint. On January 18, 1994, the district court heard arguments on the need for a stay of discovery pending Banco's motion for summary judgment on the BHCA claims. The plaintiffs gave no hint that a second amended complaint was in the offing. By order of the court, Banco was to move for summary judgment by February 7, 1994, and the trial was scheduled for April 18, 1994. On February 1, 1994, the plaintiffs unexpectedly moved for leave to file a second amended complaint. The motion remained pending when the district court entered sum-

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[6] Banco incorrectly asserts that the plaintiffs never invoked § 1972(1)(D) before the district court. In fact, references to that section appear in the plaintiffs' opposition to summary judgment.

[7] We therefore need not decide whether the workout of the loan constituted an "exten[sion of] credit" within the meaning of the BHCA.

mary judgment for Banco.

Rule 15(a) of the Federal Rules of Civil Procedure provides in part that leave to amend pleadings "shall be freely given when justice so requires." Absent factors such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or "futility of amendment," the leave sought should be granted. Foman v. Davis, 371 U.S. 178, 182 (1962).

We are confident that the district court did not abuse its "considerable discretion" by implicitly rejecting the second amended complaint. Rodriguez v. Banco Central Corp., 990 F.2d 7, 14 (1st Cir. 1993). This was the second time that the plaintiffs had attempted to amend their complaint to forestall a dispositive motion (in this instance, Banco's summary judgment motion). The first motion for leave to file an amended complaint came after the original complaint was dismissed. Moreover, after nearly five years of litigation and a prior amendment of the complaint, and with the trial less than three months away, the plaintiffs made allegations for the first time against Banco Popular, the successor-in-interest to defendant Banco de Ponce, based on conduct that took place after the termination of the loan agreement — conduct that "has continued to this date." "The further along a case is toward trial, the greater the threat of prejudice and delay when new claims are belatedly added." Rodriguez, 990 F.2d at 14. Although the district court should have "state[d] explicitly its reasons for den[ying]" leave to amend, Kay v. New Hampshire Democratic Party, 821 F.2d 31, 34-35 (1st Cir. 1987), this reason for the denial is plain from the procedural history of the case: the plaintiffs were trying to prolong discovery and postpone a ruling on the summary judgment motion in the hope that "something concrete will eventually materialize . . . ." Dow v. United Bhd. of Carpenters & Joiners of Am., 1 F.3d 56, 58 (1st Cir. 1993).

The tendered complaint would have been futile in any event because it could not have blocked summary judgment on the jurisdictional BHCA claims. See Kay, 821 F.2d at 34 ("for the sole reason that [the proposed] amendment would have been futile, it was properly denied") (citing Foman, 371 U.S. at 182). On appeal, the plaintiffs point to no particular amendment that might with appropriate

discovery have raised a genuine issue of material fact.

For all of these reasons, we reject the argument that the plaintiffs should have been allowed to file a second amended complaint.

D. The stay of discovery

The plaintiffs argue that the district court abused its discretion by staying discovery during the summary judgment proceedings, and by denying their Fed. R. Civ. P. 56(f) motion for additional discovery. This argument has not been adequately developed on appeal and must be deemed waived. See, e.g., Plaintiffs' Brief at 26 ("Executive also showed, with great particularity, where discovery stood at the time. [That discussion is incorporated by reference[.] . . .]") (citing two district court pleadings). We have searched the plaintiffs' brief in vain for a showing that their discovery requests, whether those pending at the time of the stay or those made pursuant to Rule 56(f), were necessary or even relevant to their opposition to summary judgment on the BHCA claims. Again, the plaintiffs fail to address the specific manner in which they were allegedly prejudiced by the claimed error.

Double costs are assessed against plaintiffs' attorneys pursuant to Fed. R. App. P. 38. and 28 U.S.C. § 1927.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1877

EXECUTIVE LEASING CORPORATION, ET AL.,
Plaintiffs, Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,
Defendants, Appellees.

BEFORE

SELYA, Chief Judge,
BOWNES, Senior Circuit Judge,
and STAHL, Circuit Judge.

ORDER OF COURT

Upon consideration of the plaintiffs' "Petition for Rehearing",

It is ordered that said petition for rehearing is hereby denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

By /s/ Janice M. O'Neil
Chief Deputy Clerk

[cc: Messrs. Vicente, Duran-Gonzalez]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1877

EXECUTIVE LEASING CORPORATION, ET AL.,
Plaintiffs, Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,
Defendants, Appellees.

BEFORE

SELYA, Chief Judge,
BOWNES, Senior Circuit Judge,
and STAHL, Circuit Judge.

ORDER OF COURT

Entered: March 20, 1995

Upon consideration of the plaintiffs' "Petition for Rehearing",
It is ordered that said petition for rehearing is hereby denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

By /s/ Janice M. O'Neil
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1877

EXECUTIVE LEASING CORPORATION, ET AL.,
Plaintiffs, Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered: June 22, 1995

Upon consideration of appellant's motion,

It is ordered that the mandate of this Court of March 28, 1995 is constructively recalled and reissued.

It is further ordered that the date of the order denying the petition for rehearing of Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luiz [sic] Iraida Gonzalez be and hereby is amended or corrected nunc pro tunc to March 28, 1995.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Downs, Vicente-Gonzalez, Duran-Gonzalez, Toro-Monserrate]

§ 1972. Certain tying arrangements prohibited; correspondent accounts

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of the chapter.

(2)(A) No bank which maintains a correspondent account in the name of another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk or repayment or present other unfavorable features.

(B) No bank shall open a correspondent account at another bank while such bank has outstanding an extension of credit to an executive officer or director of, or other person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, the bank desiring to open the account or to any related interest of such person, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(C) No bank which maintains a correspondent account at another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person, unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(D) No bank which has outstanding an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, another bank or to any related interest of such person shall open a correspondent account at such other bank, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(E) For purposes of this paragraph, the term "extension of credit" shall have the meaning prescribed by the Board pursuant to section 375b of this title and the term "executive officer" shall have the same meaning given it under section 375a of this title.

(F) Civil money penalty

(i) First tier. Any bank which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such bank who, violates any provision of this paragraph shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(ii) Second tier. Notwithstanding clause (i), any bank which, any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such bank who—

(I) **(aa)** commits any violation described in clause (i);

(bb) recklessly engages in an unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty;

(II) which violation, practice or breach—

(aa) is part of a pattern of misconduct;

(bb) causes or is likely to cause more than a minimal loss to such bank; or

(cc) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(iii) **Third tier.** Notwithstanding clauses (i) and (ii), any bank which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such bank who—

(I) knowingly—

(aa) commits any violation described in clause (i);

(bb) engages in any unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty; and

(II) knowingly or recklessly causes a substantial loss to such bank or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under clause (iv) for each day during which such violation, practice or breach continues.

(iv) Maximum amounts of penalties for any violation described in clause (iii). The maximum daily amount of any civil penalty which may be assessed pursuant to clause (iii) for any violation, practice or breach described in such clause is—

(I) in the case of any person other than a bank, an amount to not exceed $1,000,000; and

(II) in the case of a bank, an amount not to exceed the lesser of—

(aa) $1,000,000; or

(bb) 1 percent of the total assets of such bank.

(v) Assessment; etc. Any penalty imposed under clause (i), (ii), or (iii) may be assessed and collected—

(I) in the case of a national bank, by the Comptroller of the Currency;

(II) in the case of a State member bank, by the Board; and

(III) in the case of an insured nonmember State bank, by the Federal Deposit Insurance Corporation,

in the manner provided in subparagraphs (E), (F), (G), and (I) of section 1818(i)(2) of this title for penalties imposed (under such section) and any such assessment shall be subject to the provisions of such section.

(vi) Hearing. The bank or other person against whom any penalty is assessed under this subparagraph shall be afforded an agency hearing if such bank or person submits a request for such hearing within 20 days after the issuance of the no-

tice of assessment. Section 1818(h) of this title shall apply to any proceeding under this subparagraph.

(vii) Disbursement. All penalties collected under authority of this subsection shall be deposited into the Treasury.

(viii) Violate defined. For purposes of this paragraph, the term 'violate' includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(ix) Regulations. The Comptroller of the Currency, the Board, and the Federal Deposit Insurance Corporation shall prescribe regulations establishing such procedures as may be necessary to carry out this subparagraph.

(G)(i) Each executive officer and each stockholder of record who directly or indirectly owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of an insured bank shall make a written report to the board of directors of such bank for any year during which such executive officer or shareholder has outstanding an extension of credit from a bank which maintains a corresponding account in the name of such bank. Such report shall include the following information:

(1) the maximum amount of indebtedness to the bank maintaining the correspondent account during such year of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder, or which is controlled by such executive officer or stockholder;

(2) the amount of indebtedness to the bank maintaining the correspondent account outstanding as of a date not more than ten days prior to the date of filing of such report of (a) such

executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder;

(3) the range of interest rates charged on such indebtedness of such executive officer or stockholder of record; and

(4) the terms and conditions of such indebtedness of such executive officer or stockholder of record.

(ii) The appropriate Federal banking agencies are authorized to issue rules and regulations, including definitions of terms, to require the reporting and public disclosure of information by any bank or executive officer or principal shareholder thereof concerning any extension of credit by a correspondent bank to the reporting bank's executive officers or principal shareholders, or the related interests of such persons.

(H) For the purpose of this paragraph—

(i) the term "bank" includes a mutual savings bank;

(ii) the term "related interests of such persons" includes any company controlled by such executive officer, director, or person, or any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person; and

(iii) the terms "control of a company" and "company" have the same meaning as under section 375b of this title.

(I) Notice under this section after separation from service. The resignation, termination of employment or participation, or separation of an institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such a bank (including a separation caused by the closing of such a bank) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such bank (whether such date occurs before, on, or after August 9, 1989.)

No. 95-13

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

EXECUTIVE LEASING CORPORATION, MANUEL GONZALEZ GIERBOLINI, and LUZ IRAIDA GONZALEZ,

Petitioners,

v.

BANCO DE PONCE, (now BANCO POPULAR DE PUERTO RICO, as successor-in-interest) and BANPONCE CORP.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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Pursuant to Supreme Court Rule 15.6, petitioner Executive Leasing Corporation ("Executive Leasing") replies to points raised in respondent Banco Popular de Puerto Rico's ("Banco") opposition to the petition for writ of certiorari.[1]

INTRODUCTION

Banco's brief, instead of squarely addressing the substantive issues that Executive Leasing has raised, seeks primarily to avoid them. The novel and important question presented for review is whether Executive Leasing may introduce evidence extrinsic to the loan agreement to prove that Banco violated the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1972, by orally conditioning its financing of Executive Leasing's business on the requirement that Executive Leasing refrain from dealing with any other bank (the "exclusive dealing condition"). Although Banco does not deny that extrinsic evidence may be admitted to establish tying violations under *other* federal antitrust statutes, it does not explain why a different rule should apply to tying violations under the BHCA. Nor does it address the logical inconsistency between the legislature's plain intent to prohibit oral tying conditions and Banco's position that such conditions cannot be proven. Instead, in a transparent attempt to distract the Court from the central issue, Banco repeatedly argues *facts* which were not addressed by the Courts below and are not relevant to the legal issue before this Court.

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[1] The petition for writ of certiorari will be referred to as "Pet."; the appendix to the petition as "Pet. App."; and the respondents' opposition to the petition as "Opp."

ARGUMENT

I. EXECUTIVE LEASING'S PETITION WAS TIMELY FILED.

Contrary to Banco's assertion, Executive Leasing's petition for writ of certiorari was timely filed. Under Supreme Court Rule 13.4, the time for filing a petition for writ of certiorari runs from the date the petition for rehearing was denied. The First Circuit issued an order denying the petition for rehearing *nunc pro tunc* as of March 28, 1995. Pet. App. at 28A. The petition was filed on June 23, 1995, less than 90 days after March 28, 1995.

The First Circuit's order amending the date on the denial of the petition for rehearing, *nunc pro tunc*, to March 28, 1995 (Pet. App. at 28A) was issued to correct an error made by the First Circuit. The First Circuit failed to date its initial order denying Executive Leasing's petition for rehearing (Pet. App. at 26A), and then the clerk's office informed Executive Leasing's new counsel that its petition had been denied on March 28, 1995. When another notice dated March 20, 1995, was later issued (Pet. App. 27A) and came to the attention of counsel, the First Circuit upon a duly filed motion appropriately exercised its authority under Fed. R. App. P. 2, 26(b), and 27(b) to control its docket and correct the error to conform to the statement of the Clerk's Office. The First Circuit amended its order before Executive Leasing filed its petition for certiorari, and its action did not change this Court's jurisdiction in any way. Given these circumstances, Executive Leasing's petition was timely filed.[2]

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[2] Two of the cases on which Banco relies for its timeliness argument have no relevance here, and the third only supports the argument that Executive Leasing's petition was timely filed. *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537 (1994), which relies principally on agency law, holds that a

II. EXECUTIVE LEASING DID NOT WAIVE ITS ARGUMENT.

There is also no merit in Banco's claim that Executive Leasing waived the right to challenge the trial court's exclusion of extrinsic evidence to prove an oral tying condition prohibited by the BHCA. Banco attempts to recharacterize the arguments in Executive Leasing's petition as asserting a "conflict" between Puerto Rico law and the BHCA, or as suggesting that the BHCA "preempts" Puerto Rico law (concepts that are not mentioned anywhere in Executive Leasing's petition). However, it is beyond peradventure that Executive Leasing has consistently maintained at all levels of this litigation that the extrinsic evidence of Banco's oral exclusive dealing condition is admissible to prove a violation of the BHCA.[3]

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petition for certiorari filed by an unauthorized agent cannot be ratified after the 90-day deadline for filing the petition. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), addresses the issue of when a lower court's judgment is sufficiently final to be appealed. In *Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court found the petition for certiorari to be timely and gave great deference to the Court of Appeals' amendment of its order on a petition for rehearing, even when the amendment had the effect of extending the time to file a petition for certiorari. 495 U.S. at 49-50 (court's amended order denying petition for rehearing established beginning of 90-day period for filing petition for certiorari; "The Eighth Circuit surely knows more than we do about the meaning of its orders, and we accept its action for what it purports to be.")

[3] Executive Leasing did not waive the right to seek review of this issue by arguing below that Puerto Rico's parol evidence rule would not bar the introduction of such evidence to prove a violation of the BHCA. *Playboy Enterprises, Inc. v. Public Service Comm'n of Puerto Rico*, 906 F.2d 25 (1st Cir.), *cert. denied*, 498 U.S. 959 (1990), on which Banco relies, is not apposite here. In *Playboy*, a party objected to the introduction of certain evidence as

This Court has rejected the hypertechnical microanalysis on which Banco relies in asserting waiver. In *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), for example, a shareholder in a derivative suit argued in her principal brief in the Court of Appeals that the federal Investment Company Act did not require a shareholder to make demand on the company's directors before bringing suit on the federal statute. She argued in her reply brief that applicable *state* law did not impose a demand requirement. This Court held that the shareholder's failure to advert to state law before filing her reply brief did not waive her right to the application of anything other than a uniform federal rule of demand, stating:

> When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.

500 U.S. at 99, *citing Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).

Here, Executive Leasing has raised the issue of the admissibility of extrinsic evidence of Banco's exclusive dealing condition at every level. Executive Leasing argued in the Court of Appeals that the evidence should be admitted despite Puerto Rico's parol evidence rule. Executive Leasing argued in its principal brief on appeal that "the proper methodology for dealing with extrinsic evidence had to take into account that the gravamen of the Amended Complaint is that Banco violated specific prohibitions of the BHCA from the outset of its relations

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hearsay. On appeal, the party for the first time challenged the same evidence as lacking credibility, a substantively distinct attack. Here, on the other hand, Executive Leasing has uniformly maintained that extrinsic evidence is admissible to prove an oral tying condition in violation of the BHCA.

with Executive Leasing," and that, "[i]n the face of such allegations, the District Court could not exclude the evidence proffered by Executive Leasing under Rule 69(B) or under the Civil Code." Brief on Appeal for Plaintiffs-Appellants at 35.

In its reply brief, Executive Leasing cited federal cases which hold that the presence of a tying condition prohibited by the federal antitrust laws may be "inferred from an extrinsic course of conduct supplementing the written contract." Reply Brief at 6 n.9. At oral argument, Executive Leasing's counsel argued that the BHCA's plain language prohibiting the imposition of tying conditions "in any manner" required the admission of extrinsic evidence to establish a violation of the BHCA. In a December 12, 1994, letter to the Court of Appeals pursuant to Fed. R. App. P. 28(j), Executive Leasing brought to the Court's attention the discussion of the parol evidence issue in *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990), to further support its arguments. In its petition for rehearing, Executive Leasing argued that the First Circuit's position that extrinsic evidence could not be admitted to prove an oral tying condition under the BHCA conflicted with decisions of other circuits. Petition for Rehearing at 2-8.

In short, because Executive Leasing has challenged the exclusion of extrinsic evidence at all stages of this litigation, there has been no waiver.

III. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE ADMISSIBILITY OF EXTRINSIC EVIDENCE TO PROVE A TYING VIOLATION UNDER THE BHCA.

For various reasons, Banco errs in claiming that there is no conflict in the circuits as to whether a tying

violation under the BHCA may be proved with extrinsic evidence. First, Banco asserts simplistically that there is no conflict because all the federal circuits "recognize and enforce parol evidence rules." Opp. at 2-3. Banco misperceives Executive Leasing's argument. The conflict at issue here lies *not* in whether federal courts enforce parol evidence rules at all, but in whether they use such rules to exclude extrinsic evidence of an oral tying condition in violation of the BHCA.

Second, Banco errs in arguing that the First Circuit's decision below does not conflict with *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990). The fact that *Dibidale* involved, among other things, the question of whether plaintiff must prove that it was *actually* coerced by a lender's imposition of a tying condition is a distinction with no substance. In *Dibidale*, after the district court held that the BHCA required proof of actual coercion, the Fifth Circuit reversed and remanded to allow the borrower to prove its BHCA claims of an oral tying condition. *Dibidale* made it clear that such proof would be made by affidavits extrinsic to the written agreement. The decision also made it clear that the Fifth Circuit (unlike the First Circuit in this case) deemed extrinsic evidence of an oral tying condition to be admissible, *regardless* of the existence of a written agreement:

> The banks' contention that the parol evidence rule precludes Dibidale from raising these allegations [of an oral tying condition] in light of language in the loan agreement stating that Dibidale hired Theriot of its own free will is without merit. *The terms of the loan agreement notwithstanding*, the relevant issue is whether Dibidale has provided sufficient evidence that

> its hiring of Theriot was a condition or requirement of the loan so as to survive the banks' motions for summary judgment.

916 F.2d at 307 n.4 (emphasis added).

Banco also errs in arguing that *Integon Life Ins. Corp. v. Browning*, 989 F.2d 1143 (11th Cir. 1993), shows "that there is no conflict between the BHCA and the parol evidence rule." Opp. at 10. To the contrary, *Integon* shows that the Eleventh Circuit, like the Fifth Circuit, would admit extrinsic evidence of an oral tying condition in a suit under the BHCA.

The court in *Integon*, over defendants' objections and for the purpose of reviewing the district court's decisions on motions for summary judgment, assumed the existence of an oral tying condition that plaintiff sought to establish by extrinsic evidence. The court held, contrary to *Dibidale*, that proof of coercion *was* required under the BHCA, and further found that the borrower as a matter of law had not been coerced by the alleged oral condition. The language of the *Integon* opinion on which Banco relies does *not* suggest that extrinsic evidence of an oral condition may not be admitted; such a conclusion would obviously have been contrary to the holdings of the other antitrust cases on which the *Integon* court relied. *See Integon*, 989 F.2d at 1150-1151; Pet. at 10-14 & n.8. Instead, that language reflects the Eleventh Circuit's position that courts should look closely at such claims to determine whether the borrower was in fact coerced, with the ensuing anticompetitive effects.

Moreover, the *Integon* court expressly stated that *Dibidale* was *consistent* with *Integon's* holdings, as the facts in *Dibidale* showed that the borrower had actually been coerced by the alleged oral condition. 989 F.2d at 1151 n.20. The detailed discussions in *Integon* and *Dibidale* of whether the BHCA required proof of actual coercion, and of whether the facts would support a finding of actual coercion, would have been wholly unnecessary if those courts had accepted the notion that an oral tying condition cannot be established with

extrinsic evidence. In sum, the conflict here could not be clearer: the Fifth and Eleventh Circuits would admit extrinsic evidence to establish a tying claim under the BHCA, while the First Circuit and the district court in Michigan would exclude it. Pet. at 11.

Third, while acknowledging that federal courts admit extrinsic evidence to prove violations of other federal anti-tying provisions, Banco hastily labels these cases "irrelevant" and "inapposite" without attempting any reasoned explanation. Contrary to Banco's suggestion, the antitrust cases Executive Leasing has cited do *not* limit the admission of extrinsic evidence of oral tying conditions to situations involving fraud, coercion, or mistake.[4] Rather, as Executive Leasing explained in its petition, their rationale for admitting such extrinsic evidence is that a tying condition may harm competition just as much when it is imposed tacitly as when it is incorporated expressly in a written agreement. *See* Pet. at 12-14 & n.8. The Court of Appeals' decision in this case is in direct conflict with the accepted rule in federal antitrust cases that tying violations may be established by extrinsic evidence.

IV. BANCO'S POSITION WOULD THWART THE INTENT OF CONGRESS IN THE BHCA.

Banco has not explained how, when Congress expressed its intent in the BHCA to prohibit tying conditions imposed as "tacit understandings," it could possibly have intended to preclude any evidence to prove such an understanding. Banco's position makes no sense and would thwart the

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[4] Indeed, such a holding would be superfluous, as fraud, coercion, and mistake are widely recognized exceptions to the parol evidence rule. *See* J. Calamari & J. Perillo, *Contracts* at 159-161 (3d ed. 1987).

intent of Congress by allowing lenders to impose oral tying conditions that Congress plainly intended to prohibit.[5]

Banco also errs in arguing that the application of local parol evidence rules would not affect the scope of the BHCA's prohibitions. Significant differences in the various states' application of parol evidence rules – and, indeed, in the application of those rules by different courts within a state – are widely recognized. *See, e.g., Wilson Arlington Co. v. Prudential Ins. Co. of America*, 912 F.2d 366, 370 (9th Cir. 1990) (stating that "the parol evidence rule has been severely eroded in many jurisdictions during the past few decades" and recognizing significant differences between parol evidence rules of Virginia and California); J. Calamari & J. Perillo, *Contracts* at 134, 177 ("There is no unanimity as to the content of the parol evidence rule or the process called interpretation"; the "fog and mystery" surrounding the parol evidence rule stem from "basic disagreements" as to its application and "conflicting value judgments as to policy issues that are as old as our legal system and that are likely to continue as long as courts of law exist.")[6]

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[5] Banco errs both in claiming that it is "settled that the BHCA does not prohibit a bank from requiring a borrower not to borrow elsewhere during the term of the loan," Opp. at 14 n.12, as well as in relying on this statement in these proceedings. The plain language of the statute, as well as the legislative debate and the excerpt Banco quotes, indicate only that the BHCA was not intended to prohibit conditions that a bank "shall reasonably impose in a credit transaction to assure the soundness of the credit." 12 U.S.C. § 1972 (1)(E); 116 Cong. Rec. 32124-32126. It is obviously a question of fact whether a condition to a particular loan was imposed "reasonably" and "to assure the soundness of the credit." Banco never made such a claim here, nor did the trial court make such a finding.

[6] *See also Coca-Cola Bottling Co. v. Coca-Cola Co.*, 98 F.R.D. 254, 266 n.29 (D. Del. 1983) (refusing to certify class where

There is simply no question that the application of these different parol evidence rules, state by state, would in fact result in impermissible and unaccountable differences in the enforcement of the BHCA's prohibitions.

CONCLUSION

There is a clear conflict among the circuits with respect to the important question of federal law that Executive Leasing has raised. This issue can and should be reviewed.

Respectfully submitted,

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Dated: August 28, 1995

"differing state laws concerning parol evidence and assignments render generalized proof of plaintiff's contractual claims impracticable if not impossible"); *1726 Cherry St. Ptp. v. Bell Atlantic Properties, Inc.*, 439 Pa. Super. 141, 653 A.2d 663 (1995) (recognizing "starkly different conceptions of the parol evidence rule" in two cases decided by the Pennsylvania Supreme Court); *Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 811 (Mo. App. 1992) (referring to Missouri's parol evidence rule as "a deceptive maze rather than a workable rule").